Supreme Court, U. S.
FILED
SEP 8 1980
MICHAEL RODAK, JR., CLERK

80-378

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHRYSLER CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS M. COSTLE, Administrator,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 8, 1980

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the District of Columbia Circuit err by holding here that the Clean Air Act requires that the automobile manufacturer, and not owners and mechanics, is responsible for the proper maintenance of emission control equipment on vehicles in use when Congress clearly intended owners and mechanics to be responsible for proper in-use maintenance?

2. Did the United States Court of Appeals for the District of Columbia Circuit err in upholding the United States Environmental Protection Agency's order directing Chrysler to recall 208,000 vehicles which failed to conform to applicable emission standards where the nonconformity is caused by illegal misadjustment and tampering with emission control equipment by owners and mechanics contrary to the manufacturer's instructions and when the agency's enabling statute authorizes the recall order only when the nonconforming vehicles are found to have been properly maintained?

3. In this case of first impression under the Clean Air Act, did the United States Court of Appeals for the District of Columbia Circuit err in defining the statutory requirement of "properly maintained" in section 207 (c) (1) in a manner which is contrary to the definition of proper maintenance expressly set forth in an adjoining subsection of the Clean Air Act and contrary to the meaning of proper maintenance as it is understood as a term of art in the automobile industry and at EPA?

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OPINIONS BELOW

The Initial Decision, Findings of Fact and Conclusions of Law, and Order of the Administrative Law Judge ("ALJ"), dated February 10, 1978, finding that the United States Environmental Protection Agency ("EPA") had properly issued a Recall Order directing Chrysler to submit a plan for remedying the nonconformity of all 1975 vehicles equipped with 360 and 400 cubic inch displacement (CID) engines having two-barrel carburetors and catalytic converters, are unreported and are reprinted as Appendix C.

Chrysler appealed the decision of the ALJ to Douglas M. Costle, Administrator of the EPA. The Decision and

Order of Administrator Costle, dated November 20, 1978, upholding EPA's Recall Order to Chrysler, is unreported and is reprinted as Appendix B.

The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated June 19, 1980, affirming the Decision and Order of the EPA Administrator, is unreported and is reprinted as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit as to which certiorari is sought was entered June 19, 1980 (Appendix D). The instant petition is being filed within 90 days of June 19, 1980, the date of the judgment appealed from. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1976).

STATUTORY PROVISIONS INVOLVED

Section 207(c) (1) of the 1970 Clean Air Act amendments[1] is the applicable recall provision and provides:

> (1) If the administrator determines that a substantial number of any class or category of vehicles or engines, *although properly maintained and used,* do not conform to the regulations prescribed under section 1857f-1 of this title, when in actual use throughout their useful life (as determined under section 1857f-1(d) of this title), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer

[1] The recall order was initially issued on December 8, 1976 for vehicles built during the 1975 model year (August, 1974 to July, 1975). Thus the 1970 Clean Air Act amendments are applicable. The Clean Air Act was further amended and the Act's sections redesignated in 1977. Parallel citations are given to both the applicable and current sections in Appendix E.

> to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer. If the manufacturer disagrees with such determination of nonconformity and so advises the Administrator, the Administrator shall afford the manufacturer and other interested persons an opportunity to present their views and evidence in support thereof at a public hearing. Unless, as a result of such hearing the Administrator withdraws such determination of nonconformity, he shall, within 60 days after the completion of such hearing, order the manufacturer to provide prompt notification of such nonconformity in accordance with paragraph (2). [42 U.S.C. § 1857f-5a(c)(1) (1976) (emphasis added).]

It is Chrysler's position that "properly maintained" as used in section 207(c)(1) should be defined consistently with the maintenance provision of the adjoining section, section 207(b)(2), which imposes a performance warranty for emission control equipment upon the vehicle manufacturer for the benefit of the ultimate purchaser and each subsequent purchaser. Section 207(b)(2) provides:

> (2) at such time as he [the EPA Administrator] determines that inspection facilities or equipment are available for purposes of carrying out testing methods and procedures established under paragraph (1), he shall prescribe regulations which shall require manufacturers to warrant the emission control device or system of each new motor vehicle or new motor vehicle engine to which a regulation under section 1857f-1 of this title applies and which is manufactured in a model year beginning after the Administrator first prescribes warranty regulations under this paragraph (2). The warranty under

such regulations shall run to the ultimate purchaser and each subsequent purchaser and shall provide that if—

> (A) the vehicle or engine is *maintained and operated in accordance with instructions under subsection (c)(3) of this section,*
>
> (B) it fails to conform at any time during its useful life (as determined under section 1857f-1(d) of this title) to the regulations prescribed under section 1857f-1 of this title, and
>
> (C) such nonconformity results in the ultimate purchaser (or any subsequent purchaser) of such vehicle or engine having to bear any penalty or other sanction (including the denial of the right to use such vehicle or engine) under State or Federal law,

then such manufacturer shall remedy such nonconformity under such warranty with the cost thereof to be borne by the manufacturer. [42 U.S.C. § 1857f-5a(b)(2) (1976) (emphasis added).]

Section 207(c)(3), referred to above in section 207(b)(2)(A), provides:

> (3) The manufacturer shall furnish with each new motor vehicle or motor vehicle engine such written instructions for the *maintenance and use of the vehicle* or engine by the ultimate purchaser as may be reasonable and necessary to assure the proper functioning of emission control devices and systems. In addition, the manufacturer shall indicate by means of a label or tag permanently affixed to such vehicle or engine that such vehicle or engine is covered by a certificate of conformity issued for the purpose of assuring achievement of emissions standards prescribed under section 1857f-1 of this title. Such label or tag shall contain such other information relating to control of motor vehicle emis-

sions as the Administrator shall prescribe by regulation. [42 U.S.C. § 1857f-5a(c)(3) (1976) (emphasis added).]

Section 203(a)(3) of the Clean Air Act states that it shall be a prohibited act:

> (3) for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any manufacturer or dealer knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; [42 U.S.C. § 1857f-2(a)(3) (1976).]

Section 205 of the Clean Air Act imposes a civil penalty for tampering with emission control equipment and provides:

> Any person who violates paragraph (1), (2), (3), or (4) of section 1857f-2(a) of this title shall be subject to a civil penalty of not more than $10,000. Any such violation with respect to paragraph (1), (2), or (4) of section 1857f-2(a) of this title shall constitute a separate offense with respect to each motor vehicle or motor vehicle engine. [42 U.S.C. § 1857f-4 (1976).]

The full text of all of the above statutes and the other sections of the Clean Air Act referred to herein are set out in Appendix E.

STATEMENT OF THE CASE

This petition for certiorari concerns the validity of an order ("Recall Order") issued by the Administrator of the EPA directing Chrysler to recall 208,000 1975 model year vehicles equipped with 360 and 400 cubic inch dis-

placement (CID) engines having two-barrel carburetors and catalytic converters. The Recall Order was ostensibly issued pursuant to section 207(c)(1) of the Clean Air Act, and alleged that a substantial number of vehicles in the recall class when in actual use exceeded the 1975 federal standard for carbon monoxide (CO), although properly maintained and used.

Chrysler exhausted its administrative remedies by requesting a hearing before an Administrative Law Judge in which Chrysler contested the Recall Order and by appealing the ALJ's adverse decision to the Administrator of the EPA who upheld and reissued the Recall Order on November 20, 1978. Thereupon, pursuant to section 307(b) of the Clean Air Act, 42 U.S.C. § 7607 (b) (Supp. II 1978), Chrysler appealed the Administrator's final order to the United States Court of Appeals for the District of Columbia Circuit which affirmed the Decision and Order of the EPA Administrator.

This case is one of first impression and presents an important question of statutory interpretation under section 207(c)(1) of the Clean Air Act, as all parties have recognized from the outset of this dispute. EPA's initial recall letter, as well as the final order of the Administrator approving the recall, and the decision of the United States Court of Appeals for the District of Columbia Circuit all acknowledged that the overriding legal issue presented here is whether vehicles which have been misadjusted, contrary to the manufacturer's instructions, can be considered properly maintained for purposes of ordering a manufacturer to recall the vehicles for modification pursuant to section 207(c)(1). Thus, this case raises for the first time the question of who is responsible for the proper maintenance of vehicles which have left the manufacturer's control and are in actual use on the road. The material facts as found by the Court of Appeals or as otherwise undisputed are summarized below.

The 1975 model year standard for carbon monoxide (CO) was 15 grams/mile as measured by the Federal Test Procedure, down from 39 grams/mile in 1974. To achieve this lower emission level, Chrysler engineers added to the 1975 model year vehicles a new emission control device called a catalytic converter. Preproduction testing confirmed that Chrysler could meet the new federal standard using the catalytic converter without an auxiliary air pump.

The other principal components of the emission control system utilized in the recall vehicles were carried over from the previous model year. The entire emission control system was well within the state-of-the-art at the time of its design and manufacture. In particular, Chrysler's carburetor, which EPA alleges was deficient, was similar to what other domestic and foreign manufacturers were using at the time. App. A, p. 18a n.46.

Before production of the 1975 models began in the summer of 1974, Chrysler, as required by the Clean Air Act, submitted to EPA for its review the design specifications for these vehicles, the recommended maintenance instructions, and prototype vehicles for emission testing. App. A, p. 64a. The maintenance instructions specifically included the idle set procedures at issue in this case. Based on this information and the actual emission test results of the prototypes, EPA certified that these vehicles conformed with federal emission standards and all applicable regulations, thus permitting their production and sale. App. A, p. 18a. EPA also approved Chrysler's proposed maintenance instructions for the recall vehicles. App. A, p. 64a.

As part of its in-use testing, EPA, in 1976, contracted with Olson Laboratories to run tests on recall class vehicles in the Detroit area. Ten vehicles of each recall class were secured and the Federal Test Pro-

cedure, used to certify compliance with applicable standards, was run twice on each Chrysler vehicle—once in the "as received" condition and once "after maintenance," that is, with the idle air/fuel mixture screw and other vehicle parameters set as prescribed in Chrysler's instructions. App. A, p. 24a. EPA also gathered the test results of recall class vehicles involved in a different EPA study program (the so-called "Emission Factor" Program) and reviewed reports of state inspection/maintenance programs for the recall class vehicles. These two programs, however, tested vehicles without regard to their state of maintenance and the state inspection/maintenance programs did not use the Federal Test Procedure. App. A, pp. 22a-23a.

The results of the Olson investigation were communicated to Chrysler in December, 1976, in a letter in which the EPA demanded recall of the vehicles for excessive CO emissions. The Olson results communicated to Chrysler were as follows:

	360's		400's	
	As Received	After Maint.	As Received	After Maint.
Number Tested	10	10	10	10
Percent Over Standard				
CO	100%	20%	80%	30%

EPA found that the excessive CO in the "as received" vehicles was due to misadjustment of the idle caused by persons in the field adjusting the idle mixture screws contrary to the manufacturer's instructions. *See* App. A, p. 3a; App. B, pp. 74a-75a.

The Chrysler-specified method for setting the idle on these vehicles was submitted to EPA for its approval

prior to production and is affixed to the vehicle by means of an underhood label reading in part:

> Use exhaust analyzer, placed in probe tap in front of catalytic converter. Adjust idle speed screw and mixture screws to give .3% carbon monoxide * * * with lowest hydrocarbons or smoothest idle at 750 RPM.

EPA approved Chrysler's idle set procedure as being in compliance with its regulations regarding "reasonable and necessary" written maintenance instructions to be provided to the ultimate purchaser. App. A, p. 64a.

Exhaust analyzers, which measure concentrations of specified gases, are available for purchase (and have been since about 1970),[2] are widely used by EPA in state inspection programs for emission measurements, are recommended by the National Academy of Science for diagnostic garage service work,[3] are conceded to be the most accurate method of setting idle to an emission specification,[4] and can be used accurately by mechanics of average ability.[5]

When idle mixture screws of vehicles of the recall class are set in accordance with Chrysler's recommended procedures, the vast majority of these vehicles meet the applicable federal emission standards throughout their statutory useful lives (five years or 50,000 miles). App. A, p. 10a.

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[2] Joint Appendix filed in the court below at I:47 (hereinafter cited as "J.A. —:—"). [A copy of the Joint Appendix has been lodged with the Clerk of this Court.]

[3] J.A. IV:1304, 1342.

[4] J.A. II:799-801.

[5] App. A, p. 61a n.145.

REASONS FOR GRANTING THE WRIT

This case presents an important question of first impression under the Clean Air Act concerning who is responsible—the manufacturer or the mechanic/owner—for improper maintenance of emission control equipment on vehicles which have left the manufacturer's control and are in actual use on the road. In this case it is undisputed that emission nonconformities in the recall vehicles are caused by misadjustments by mechanics and owners of the idle set screw, contrary to the manufacturer's instructions. When done by mechanics, such acts constitute illegal "tampering" with the vehicle punishable by a civil penalty. *See* Clean Air Act §§ 203(a)(3) and 205, 42 U.S.C. §§ 1857f-2(a)(3) and 1857f-4 (1976). Despite this penalty, it is also undisputed that such intentional tampering is widespread throughout the service industry and common on all models of domestic automobiles. *See, e.g.*, 42 Fed. Reg. 56298 (1977). Nowhere in its 66-page opinion does the court below treat this undisputed evidence of pervasive tampering and misadjustment by mechanics and owners; instead, it reaches its own conclusion that manufacturers are responsible for failing to foresee and prevent tampering and intentional misadjustments of the emission control system.

The court's rationale for why EPA's Recall Order is proper here has no support in the underlying Clean Air Act or in the relevant legislative history. Rather, this case is a disturbing example of the tendency of some courts in recent years to expand by judicial fiat the authority of regulatory agencies beyond the plain limitations set down by Congress in the agency's enabling legislation. This Court has tried to arrest this trend on several occasions in recent years,[6] but as this case dramatically

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[6] *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

illustrates, some courts have continued to place their own views of the public interest ahead of the clear mandate of the legislation duly enacted by Congress.

In this instance Congress expressly provided that, for purposes of section 207(b) of the Clean Air Act, a motor vehicle is properly maintained when it has been *maintained in accordance with the manufacturer's instructions as approved by EPA. See* Clean Air Act, §§ 207(b)(2)(A) and 207(c)(3), 42 U.S.C. §§ 1857f-5a(b)(2)(A) and 1857f-5a(c)(3) (1976). *See also* 40 C.F.R. §§ 85.075-38, 39 (1976). Congress in section 207(c) then expressly limited the recall power of EPA to vehicles in actual use which fail to comply with applicable emission standards "although properly maintained and used." Clean Air Act, § 207(c)(1), 42 U.S.C. § 1857f-5a(c)(1) (1976).

Chrysler contends that Congress clearly intended "properly maintained" in section 207(c)(1) to mean the same thing it does in section 207(b); that is, as defined in section 207(c)(3) to be in accordance with the manufacturer's written instructions for the maintenance and use of the vehicle. The published opinions of EPA's General Counsel agree. *See* 1 *United States Environmental Protection Agency, General Counsel Opinions* "Air Pollution" 105 (1979). EPA and the court below reached a different conclusion by disregarding the plain meaning of the statute and the intent of Congress.

The Administrator below found that the recall vehicles were emitting excessive CO due to improper adjustment by owners and mechanics of the air/fuel idle mixture in carburetors in the recall vehicles contrary to the manufacturer's instructions. App. B, pp. 74a-75a. Realizing that section 207(c)(1), as written, did not authorize a recall order to the manufacturer in such circumstances, the Administrator arrogated to himself the power to amend section 207(c)(1) by openly and expressly adding what he called a "further gloss" to the statute of his own

creation. App. B, p. 78a. The Court of Appeals allowed the Recall Order to stand by accepting the Administrator's "further gloss" on section 207(c)(1) and by adding its own gloss to the statute. The court's gloss is variously formulated, but is to the effect that EPA may order a recall even when the nonconforming vehicles are not being properly maintained by owners and mechanics if the improper maintenance by owners and mechanics was foreseeable by the manufacturer and it was within the practical ability of the manufacturer to reduce the impact of the improper maintenance by designing the vehicle differently. App. A, p. 50a.

The court's gloss also means the manufacturer will be second guessed, even though its design is within the state-of-the-art, if later designs prove more resistant to illegal tampering. Unless the faulty holding of the Court of Appeals is corrected by this Court, the intent of Congress to allocate responsibility for proper maintenance on vehicles in use to owners and mechanics will be frustrated, and a manufacturer will suffer the enormous cost and unjustified expense of recalling over 208,000 vehicles due to the illegal or improper acts of others outside the manufacturer's control.

A. The Court Below Interpreted Section 207(c)(1) of the Clean Air Act So As To Defeat the Plain Language of the Statute and Substitute Its Version of the Statute for that Enacted by Congress.

As the statute makes clear, and all parties agree, EPA's recall authority under section 207(c)(1) is contingent upon EPA's "proving that a substantial number of in-use vehicles of the recall class exceed the applicable Federal emission standard *although properly maintained and used.*" *See* App. B, p. 77a; App. A, p. 34a. The Administrative Law Judge found: "It is clear that the phrase 'properly maintained and used' contained in Sec.

207(c)(1) is synonymous with the statement in Sec. 207(b)(2)(A) that a vehicle be 'maintained and operated in accordance with instructions under subsection (c)(3).'" App. C, p. 130a. That subsection requires an automobile manufacturer to:

> [f]urnish with each new motor vehicle * * * such written instructions for the maintenance and use of the vehicle or engine by the ultimate purchaser as may be reasonable and necessary to assure the proper functioning of emission control devices and systems. [42 U.S.C. § 1857f-5a(c)(3) (1976).]

The Administrator himself noted that this definition was "consistent with the related warranty provisions of Section 207 of the Act" and the technical meaning of the term in the industry. App. B, pp. 75a-76a.[7] EPA's own General Counsel has reached the same conclusion and stated that "the 'properly maintained and used' language of § 207(c)(1) * * * refer[s] to the maintenance described in § 207(c)(3)." 1 *United States Environmental Protection Agency, General Counsel Opinions* "Air Pollution" 105, 111 (1979).

Given this clear and correct interpretation of the meaning of the phrase "properly maintained" in section 207 by EPA, there is a jarring inconsistency in the issuance of the Recall Order since the Administrator readily admits:

> [T]he record in this proceeding conclusively establishes that the cause of excessive carbon monoxide

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[7] Chrysler's position would not mean that a manufacturer would be free to specify technical or difficult maintenance instruction because EPA must review such instructions for feasibility and reasonableness during certification of vehicle design prior to manufacture. *See* 40 C.F.R. §§ 85.075-38, 39 (1976). Further, the Court of Appeals here found that in 1974 EPA approved Chrysler's maintenance instructions for the recall vehicles as "reasonable and necessary to assure the proper function" of the emission control system. App. A, p. 64a.

> emissions in the Chrysler recall class vehicles is attributable to misadjustments of the carburetor idle mixture adjustment and that such misadjustments were performed in a manner *inconsistent with or contrary to the manufacturer's written specifications.* [App. B, p. 75a. (emphasis added).]

Thus, in the Administrator's own words, the nonconformity of the vehicles at issue has been conclusively established to have been caused by a *failure* of the cars to be properly maintained.

Faced with the fact that this Recall Order cannot be sustained based on the plain language of the statute, the court below followed the Administrator in adding a "further gloss" to section 207(c)(1) which, stripped of its camouflage, is nothing more than an attempt to conjure up the power to recall vehicles that were not properly maintained when Congress has not conferred that power upon EPA.

Both the court below and the Administrator try to justify their interpretation of section 207(c)(1) by looking beyond the clear words of the statute to their own notion of what the proper allocation of responsibility should be between manufacturer, mechanic and owner for the proper maintenance of emission equipment on vehicles in use on the highways. This type of reasoning violates this Court's recent admonition in *Harrison* v. *PPG Industries, Inc.*, 100 S. Ct. 1889, 1894-98 (1980), that statutes which are clear on their face should be interpreted as such and should not be amended by judicial fiat because the court believes a different rule would better serve its view of the public interest.

When, as here, the statutory meaning is clearly revealed by the words of the statute itself, there is no warrant for looking outside the four corners of the statute for clues to its meaning. *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). Only "unmistakable

support in the history and structure of the legislation" can justify the rejection of otherwise unambiguous language. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J. concurring). By approving the Administrator's "further gloss" on section 207(c)(1), the court below violated its duty "to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States* v. *Great Northern Railway Co.*, 343 U.S. 562, 575 (1952).

The court below rejects Chrysler's contention that section 207(c)(1) is clear on its face for two reasons. After conceding, as it must, that proper maintenance for purposes of section 207(b)(2)(A) of the Clean Air Act is defined by section 207(c)(3) as maintenance in accordance with the manufacturer's written instructions, the court observes that section 207(c)(1) reads "properly maintained and used" without express reference to the manufacturer's written instructions. Even though section 207(c)(3) is part of the same statutory subpart of the Clean Air Act as section 207(c)(1), and even though both subparts were enacted by Congress contemporaneously, the court asserts that Congress "may" have meant something very different in section 207(c)(1) because it did not refer to section 207(c)(3) explicitly.

While admitting that Chrysler's definition, the ALJ's definition, the EPA General Counsel's definition and the industry's definition of "properly maintained" as that set out in section 207(c)(3) is "plausible," the court speculates that in the context of section 207(c)(1) it is "possible * * * that Congress intended" properly maintained to have a different meaning. App. A, p. 43a.

The court's specious reasoning derives from its concern that EPA "might not be able to obtain precise documentation of the maintenance that was performed" on vehicles in a proposed recall class and thus have difficulty proving proper maintenance. The court contrasts

EPA's position in this regard with that of an owner who has ready access to maintenance information about his own car in a warranty action under section 207(b)(2)(A). App. A, p. 43a. This concern about EPA's access to maintenance information, even if it were justified, would be no basis on which to imply a new definition of "properly maintained" contrary to that expressly identified by Congress.

But in any event, obtaining detailed maintenance information from owners is not essential for EPA to justify a recall under section 207(c)(1). Here, for example, EPA could have justified a recall order against Chrysler without any information about past maintenance of the recall vehicles by showing that when the carburetors of the recall vehicles are adjusted to Chrysler's specifications a substantial number of them still emit excessive CO. EPA's own Olson tests in this case, however, show exactly the opposite, namely that the vast majority of the recall vehicles meet the applicable CO standard in actual use when properly adjusted. Thus, the court is plainly wrong that section 207(c)(1) must be read inconsistently with section 207(c)(3) in order for EPA to preserve an effective recall power under section 207(c)(1).[8]

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[8] Contrary to the implication of the court's opinion, numerous recalls can and have been carried out to date, without the need for detailed maintenance information by EPA and with the voluntary cooperation of automobile manufacturers, where in-use testing suggested that the prototype vehicle certified by EPA unexpectedly deteriorated in use to the point that the vehicles could no longer meet the applicable emission standards and remedial repairs were necessary.

This recall is contested because these vehicles not only complied with applicable emission standards when sold by Chrysler, but they will continue to do so in use if they are properly maintained by owners and mechanics. There has been no deterioration in the system or any of its parts.

The court also justifies reading sections 207(c)(1) and 207(c)(3) differently on the meaning of "properly maintained" because section 207(c)(1) contains the phrase "when in actual use." App. A, p. 44a. The court states this language shows "Congress was concerned with everyday conditions, not with an ideal world in which the technical instructions of the manufacturer are obeyed to the letter." *Id.* This may be true, but it is beside the point. Chrysler does not oppose this Recall Order on the ground there has been some technical or trivial failure by owners and mechanics to maintain the recall vehicles properly. Rather, the undisputed evidence shows and the Administrator found that the recall vehicles are not in compliance due to intentional gross misadjustments of the carburetor by owners and mechanics contrary to the express instructions of the manufacturer and in violation of the anti-tampering provisions of the Clean Air Act. *See* text at p. 11, *supra*. In sum, the court below offers no compelling reason for rejecting the plain language of section 207(c)(1) and for defining "properly maintained" there differently than Congress expressly did in subparts (b)(2)(A) and (c)(3) of the same statute.

B. By Ignoring Congress' Intention that the Service Industry Bear Primary Responsibility for the Proper Maintenance of Vehicles in Actual Use, the Court of Appeals Mistakenly Held This Manufacturer Responsible for the Improper and Often Illegal Actions of Owners and Mechanics.

Brushing aside the clear language of section 207(c)(1), the court below purported to define the meaning of the "properly maintained" language in this section based on the underlying legislative history and the statutory scheme of the Clean Air Act. Remarkably, however, the court below fails to cite any evidence in the legislative history of section 207(c)(1) which supports its claim that Congress intended to impose absolute liability on

the manufacturer for in-use nonconformities even in the face of intentional tampering. Rather, the legislative history plainly shows that Congress required that manufacturers produce cars which would meet applicable emission standards if maintained by owners and mechanics using "reasonable and necessary maintenance procedures" approved by EPA. There is no warrant in the legislative history for rewriting section 207(c)(1) along the lines proposed by the court and the Administrator below.

The portions of the legislative history cited by the court below show only that Congress was very concerned with the problem of clean air and allocated responsibility for ensuring that the emission standards were met not only to the manufacturer, but to the vehicle owner and mechanic as well. App. A, pp. 44a-48a. Congress recognized that a partnership between manufacturer, owner and mechanic was necessary. In fact, in one portion of the legislative history quoted by the court below, Senator Muskie acknowledges that "it is not presently possible [for manufacturers] to build a maintenance-proof clean car," but that it is possible for manufacturers to build "durable" systems which will work satisfactorily if maintained properly by the owner. App. A, p. 46a. Senator Muskie emphasized, however, that without both manufacturer and owner working together the objective of cleaner air could not be realized. The court below acknowledged all of this, but placed no weight on it.

Instead, the court below relies on an ambiguous colloquy between Senators Allott and Muskie to conclude that the primary responsibility for proper maintenance of emission control equipment on vehicles in actual use rests with the manufacturers of those vehicles and not with the service industry whose job it is to maintain those vehicles. App. A, pp. 44a-48a. After noting that Senator Allott complained that obtaining competent main-

tenance was very difficult these days, the court quotes at length from Senator Muskie's response to the effect that Congress cannot solve the problem of poor maintenance or create a maintenance capability throughout the country, since "only the automobile industry can do that." *Ibid.* From this remark and this remark alone, the court below infers that Congress intended to place "primary responsibility on the design capability of the manufacturers rather than on the maintenance capabilities of mechanics and owners" in its effort to solve the problem of proper maintenance.

The court's conclusion does not follow from the passage relied upon, since whatever obligation car manufacturers may have to improve the education and training of mechanics across the country, that obligation does not mean that when mechanics intentionally misadjust carburetors on vehicles in violation of the anti-tampering laws the manufacturer is responsible for correction of this problem. In fact, the court admits that it was not until EPA adopted new regulations in 1979 that the manufacturer was obligated—starting with the 1981 model year—to construct engines which would pass federal emission standards even when misadjusted. App. A, p. 51a. The present case attempts to apply this new regulation retroactively to Chrysler's 1975 model year.

In relying on the ambiguous colloquy between Senators Allott and Muskie, the court below ignored much more persuasive evidence of Congress' intent, as disclosed in the anti-tampering and after-sale inspection provisions of the 1970 and 1977 Clean Air Act amendments, to place the burden of overseeing and assuring proper maintenance of in-use vehicles on the service industry and on EPA and the states as the policemen of service industry practices. There are inspection/maintenance programs provided for in the Clean Air Act, along with grants for such programs, clearly indicating Congress'

intent to place reliance on proper monitoring of the service industry. Clean Air Act, § 210, 42 U.S.C. § 1857f-6b (1976). Only by completely ignoring this clear evidence of Congress' intent could the court below have reached the conclusion it did.

In 1970, Congress prohibited tampering with emission control equipment by manufacturers or dealers, Clean Air Act, § 203(a)(3), 42 U.S.C. § 1857f-2(a)(3) (1976), and made funds available to states to establish voluntary inspection and emission control programs to monitor the emission performance of vehicles in use and the type of maintenance these vehicles were receiving by owners and mechanics, Clean Air Act, § 210, 42 U.S.C. § 1857f-6b (1976). Presumably, Congress, like the manufacturers, believed these measures would be adequate to discourage tampering and promote proper maintenance. Unfortunately, as the facts of this case show, they are not.

Sometime after the 1975 model year cars were sold and in use, investigations by EPA and others indicated that illicit tampering with emission control devices by owners and mechanics was becoming commonplace and continuing on all makes of automobiles. In 1977, evidence was submitted to Congress showing widespread tampering and improper maintenance throughout the service industry. *House Comm. on Interstate and Foreign Commerce, Report on Clean Air Act Amendments of 1977*, H.R. REP. No. 95-294, 95th Cong., 1st Sess. 282-84 (1977) (hereinafter cited as "*House Report on Clean Air Act Amendments of 1977*"). In fact, Congress noted that in the wake of the energy crisis of 1974 and thereafter a number of private garages had publicly and extensively advertised emission control device removal services. *Senate Comm. on Environment and Public Works, Report on Clean Air Act Amendments of 1977*, S. REP. No. 95-127, 95th Cong., 1st Sess. 78 (1977) (hereinafter cited as "*Senate Report on Clean*

Air Act Amendments of 1977"). Emission control removal manuals were marketed. *Ibid.*

The states, Congress also determined, had not been enforcing state anti-tampering laws effectively. *Ibid.* Accordingly, in 1977, Congress strengthened the federal anti-tampering provision by amending it to apply to private garages as well as dealers and manufacturers. Clean Air Act, § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B) (Supp. II 1978). This amendment was intended to help assure that emission control systems would function in the field as intended by the manufacturer and to save fuel, since tampering often hurts (rather than helps) fuel economy and engine durability. *House Report on Clean Air Act Amendments of 1977, supra,* at 197-98.

In 1977, Congress also expanded and improved provisions for state inspection and maintenance programs primarily in order to reduce in-use vehicle emissions "by ensuring that the emission levels of those vehicles are not permitted to deteriorate due to inadequate or improper maintenance." *House Report on Clean Air Act Amendments of 1977, supra,* at 282.

The actions of Congress in 1970 and 1977 and the expressed reasons given by Congress for those actions, speak far more clearly than the ambiguous colloquy relied on by the court below between Senators Allott and Muskie. These actions show that Congress intended owners and mechanics (and *not* manufacturers) to be responsible for the proper maintenance of emission control systems in vehicles in use. Even in 1977, Congress did not require Detroit to produce a tamper-proof or maintenance-proof car. Clearly, both in 1970 and 1977, Congress was relying on owners and mechanics to maintain in-use vehicles properly and upon EPA and the states to see to it that they did.

In fact, Congress has explicitly recognized that the misadjustment of the idle mixture, for which the court below attempts to hold Chrysler responsible, constitutes "tampering."

> Tampering includes not only the removal of add-on pollution control devices and the disconnection of elements in the pollution control system but it extends to the purposeful setting of engine adjustments to other than manufacturers' recommended specifications. *For example, the setting of the idle fuel flow to result in excessively rich mixtures at idle would be considered tampering.* [*Senate Report on Clean Air Act Amendments of 1977, supra,* at 78-79 (emphasis added).]

Since Congress has plainly stated in unequivocal terms that idle mixture misadjustments constitute tampering, the court below cannot properly rely on an ambiguous exchange of remarks between two senators to support its claim that the recall vehicles herein which have been subjected to such tampering are "properly maintained" under section 207(c)(1).

The Administrator himself found that the misadjustments occuring in the field on the recall vehicles are intentional acts, many of which constitute illegal "tampering," prohibited by section 203(a)(3) of the Clean Air Act. App. B, p. 121a. Further, a recent study by EPA found that tampering is an industry-wide problem, not limited to Chrysler vehicles. J.A. IV:1575-1684. The court below avoids reference to these uncontested facts in trying to pin responsibility on Chrysler for the misadjustments which have occurred.

It is obvious that the carburetor misadjustments at issue here were intentional, since Chrysler's specified idle setting stares out at the mechanic each time he opens the hood. EPA's own witness on mechanics' capabilities and knowledge testified that there was "generally good

knowledge [among mechanics] that they are not supposed to do anything but adjust to manufacturer's specifications." J.A. II:588. The Court of Appeals specifically acknowledged that mechanics were capable of performing Chrysler's procedures but were not motivated to do so. App. A, p. 61a n.145. Thus, the nonconformity of the recall class vehicles is in the main attributable to deliberate illegal acts by those who seek to defeat the emission control systems designed and installed by the manufacturer. In these circumstances, the appropriate remedy is not recall at the expense of the manufacturer, as the court below concludes, but to stop tampering through vigorous enforcement of the laws and public education. Unfortunately this has not been done either by EPA or the states.

The Court of Appeals admits, as it must, that it makes little sense to impose liability on the manufacturer for emission nonconformities primarily caused by intentional or negligent maintenance by owners and mechanics. App. A, p. 49a. Ironically, it is precisely this type of intentional and faulty maintenance by owners and mechanics which the Administrator found causes the nonconformities in vehicles in the recall class. When properly adjusted, the recall vehicles do meet the applicable CO standard in actual use.

To salvage this Recall Order on these facts, the court below distorts the language of section 207(c)(1) beyond recognition and holds Chrysler responsible for misadjustments of the recall vehicles made after the vehicles have left Chrysler's control and contrary to Chrysler's express instructions for proper maintenance. In so doing, the court says:

> [i]f a manufacturer knowingly used an emission control system resulting in a large number of misadjustments, instead of a less sensitive and more durable system available to it, it should be held

> responsible under the Act for the consequences and be subject to a recall. [App. A, p. 50a.]

Chrysler vigorously denies that it is fair or in the public interest to require manufacturers to foresee, and to take every step to prevent, all forms of improper maintenance which may occur given the design of their vehicles and to bear the enormous cost of a recall if they fail to do all they can to minimize the impact of improper maintenance in the field, or if their procedures were later deemed "cumbersome." To require manufacturers to do so would make them virtual insurers of the maintenance performed on their cars even though they have no control over the quality of that maintenance.

But what is in the public interest is not for Chrysler or the court below to say, because Congress has spoken directly to this issue in section 207(c)(1) and made clear that the manufacturer's duty extends to building cars which are functional and which will meet the applicable emission standards throughout their statutory useful life *if properly maintained and used.* The recall vehicles will do that. Having found, along with the ALJ and the Administrator, that the emission nonconformities in the recall vehicles are due to intentional misadjustment by owners and mechanics, the court below erred in ordering Chrysler to bear the enormous cost of a recall for failing to do more to anticipate and minimize the impact of the widespread tampering with these vehicles by owners and mechanics which has occurred.

CONCLUSION

For all of the above reasons, it is respectfully suggested that certiorari be granted and that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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September 8, 1980